IN THE

Supreme Court of the United States

October Term, 1962

No. 414

MICHAEL SHENKER,
Petitioner

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Was the Petition for rehearing properly denied by the Circuit Court of Appeals in accordance with its Rules of Procedure?

2. Is a railroad liable under the Federal Employers' Liability Act for failure to provide a safe place to work for its employee who claims to have been injured when in the course of his duties he is performing work on the baggage car of another carrier, the employer railroad having no control whatever over the train or the baggage car involved and no opportunity at any time to inspect the said train or car prior to the alleged injury and where there was no evidence of any relationship between the two railroads so as to make the employer railroad the agent of the other carrier?

COUNTER-STATEMENT OF THE CASE

This is an action under the Federal Employers' Liability Act instituted by Michael Shenker as plaintiff, petitioner herein, against The Baltimore and Ohio Railroad Company, his employer. Later, the plaintiff joined The Pittsburgh & Lake Erie Railroad Company as a defendant. The Trial Judge directed a verdict in favor of The Pittsburgh & Lake Erie Railroad Company for two reasons. First, lack of diversity of citizenship (87a) and secondly, no employer-employee relationship between Shenker and The Pittsburgh & Lake Erie Railroad Company so as to bring the case under the Federal Employers' Liability Act (119a). A judgment was entered in favor of The Pittsburgh & Lake Erie Railroad Company from which judgment no appeal was taken. During the trial, the Trial Judge withdrew from the consideration of the jury any reference to an alleged contract between the two railroads for the use of the train facilities at New Castle, Pennsylvania (96a). The case against The Baltimore and Ohio Railroad Company was submitted to the jury which found a verdict in favor of the plaintiff, Michael Shenker, in the amount of $40,000. Judgment n.o.v. having been refused by the court below, an appeal was taken which resulted in the reversal of the judgment by the Court of Appeals (App. 27). The plaintiff, Michael Shenker, petitioned for a rehearing which was denied (App. 27).

Michael Shenker, age 53, was employed by The Baltimore and Ohio Railroad Company, hereinafter at times referred to as the B&O Railroad Company, from five and

a half to six years, and at the time of the alleged accident was a baggage man, mail man and caller at its New Castle, Pennsylvnia, Station (20a). He had worked for about four months on this particular job (70a). On October 15, 1956, the facilities at New Castle consisted of two waiting rooms; one for the B&O and the other for The Pittsburgh & Lake Erie Railroad, hereinafter at times referred to as the P&LE, with separate tracks and one ticket office, which is the property of the B&O Railroad Company; all employees at this combination station are B&O employees (96a-97a). In other words, the P&LE has two sets of tracks and a waiting room and the B&O has two sets of tracks, a waiting room and a ticket office.

On October 15, 1956 at about 12:25 a.m., Shenker pulled his mail truck over to what is known as the P&LE Station and spotted the truck where he thought the train would come in, and waited for the train (17a, 20a and 21a). Passenger train, known as No. 79, operated by the P&LE Railroad Company on the P&LE tracks, and headed west to Youngstown, Ohio, came in to the P&LE Station (15a). Mr. Shenker had twenty to twenty-five bags of mail on his truck: some of them weighing twenty-five to fifty pounds and others eighty to one hundred pounds (22a, 23a). He testified that the opening in the baggage car door of Train No. 79 was twenty to twenty-four inches (63a). Shenker claimed that he hurt his back in placing the mail bags in this car. After he had unloaded his cart, he reported to the B&O Ticket Agent that he hurt his back, but he made no report as to the condition of the door on the baggage car. He refused to permit the agent to call the company doctor or to take him to the hospital, and finished his tour of duty (68a and 69a). There is no set time limit during which the mail had to be unloaded because the train is

required to stay at the station until that work is taken care of (70a). Mr. Shenker claimed that he spoke about the door to Edward William Beek, the baggage man employed by the P&LE who was inside the baggage car involved in the case, and that Mr. Beck said to do the best he could and that he would have to report to have the door fixed (21a). Mr. Beck testified that he did not recall anything wrong with the door, nor having said anything about the door to Mr. Shenker. So far as he recalled, the door worked all right, and that on different runs he made on No. 79 he never had a bad door (100a and 102a).

ARGUMENT

First Question:

I. WAS THE PETITION FOR REHEARING PROPERLY DENIED BY THE CIRCUIT COURT IN ACCORDANCE WITH ITS RULES OF PROCEDURE?

Respondent, The Baltimore and Ohio Railroad Company, contends that the Court of Appeals for the Third Circuit properly denied the Petition for rehearing. Regardless of the composition of the Court to which the Petition and Answer in Opposition thereto were presented, the method of procedure is stated in the Rules of the said Court, particularly Rule 33, which provides as follows:

> "A petition for rehearing may be filed with the clerk of this court within 15 days after judgment is entered, unless the time is enlarged by order of the court. It must be printed, and briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such *a petition is not subject to oral argument and will not be granted, unless a judge who concurred in the judgment desires it, or the court or the division which rendered it so determines.*"

An examination of the Order of Court (App. 27) discloses that the Petition for Rehearing was considered by six of the eight judges of the Court, namely: Chief Judge

Biggs, Judges Goodrich, Kalodner, Staley, Ganey and Smith. The Petition was denied, with Judges Biggs, Kalodner, Staley and Smith dissenting; and Judges Goodrich and Ganey voting to refuse the Petition. It is to be noted that the division of the Court which rendered the original judgment were Judges Goodrich, Kalodner and Ganey. The majority opinion was written by Judge Goodrich, with Judge Ganey concurring and Judge Kalodner dissenting.

Under Rule 33, it is submitted that either the entire Court, or the division which rendered the original judgment, or one of the concurring judges, must determine or desire a rehearing. It is obvious from the record the entire Court did not desire a rehearing (App. 27). A majority of the *entire Court* did not desire a rehearing. The division of the Court which rendered the judgment did not desire a rehearing, nor a judge who concurred in the judgment. Not one judge who heard the original argument changed his mind. Judge Goodrich and Judge Ganey stood by their original opinion and voted against any rehearing. Judge Kalodner still dissented. The other judges who dissented were strangers to the proceedings.

We submit that the granting, or refusal, of a petition for rehearing is governed by the Rule of the Court of Appeals for the Third Circuit. The petition for a rehearing was denied, and properly denied, by the Court of Appeals for the Third Circuit.

Second Question:

2. IS A RAILROAD LIABLE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT FOR FAILURE TO PROVIDE A SAFE PLACE TO WORK FOR ITS EMPLOYEE WHO CLAIMS TO HAVE BEEN INJURED WHEN IN THE COURSE OF HIS DUTIES HE IS PERFORMING WORK ON THE BAGGAGE CAR OF ANOTHER CARRIER, THE EMPLOYER RAILROAD HAVING NO CONTROL WHATEVER OVER THE TRAIN OF THE BAGGAGE CAR INVOLVED AND NO OPPORTUNITY AT ANY TIME TO INSPECT THE SAID TRAIN OR CAR PRIOR TO THE ALLEGED INJURY AND WHERE THERE WAS NO EVIDENCE OF ANY RELATIONSHIP BETWEEN THE TWO RAILROADS SO AS TO MAKE THE EMPLOYER RAILROAD THE AGENT OF THE OTHER CARRIER?

The Petitioner has suggested that the construction of the Federal Employers' Liability Act by the court below is in conflict with decisions of this Court and of other courts of appeal. It is respectfully submitted that there is a great distinction between the case at bar and the cases referred to by the petitioner. In all of them, there was an element in addition to the mere presence of the employee on the property or premises of a third person. The case at bar is unusual in that there is of record nothing to show the relationship, if any, between the B&O Railroad Company and the P&LE Railroad Company at the Station involved. The Court of Appeals found no negligence on the part of the B&O Railroad Company and this finding is sustained by the testimony. If there was any negligence at all, and that is questionable, it was the

negligence of the P&LE Railroad Company in permitting a car to be used when its door could not be opened more than 24 inches. There was absolutely no testimony of any defect in the door nor, in fact, as to the cause of the failure of the door to open more than 24 inches. There was no attempt to show any defective condition of the cart which Mr. Shenker was using nor of the railroad tracks nor the grounds nor, of anything else.

This train which was owned and operated by the P&LE Railroad Company came into the P&LE Station and was there just long enough for Mr. Shenker to unload and load the mail. There was no opportunity for any employee of the B&O Railroad Company to inspect the train or the door of the baggage car at any time before it arrived at the Station. When the train did arrive, the only B&O employee who had anything to do with the train was Mr. Shenker. He testified to the alleged defect, if it might be so called, in the door, and then decided to go ahead and load the car. To say that the B&O Railroad Company was required to inspect this car before it came into the Station would be to place an impossible duty on the railroad. Just because one of its employees was to load mail on a baggage car would not justify the railroad in stopping the train of another carrier on that carrier's tracks and demand the right to inspect it before it came into the combination-station, nor can the railroad be charged with notice because it did not do this impossible thing. It was not the intention of the Federal Employers' Liability Act to make the employer an insurer of the employee's safety whether on its own premises or that of another. There still must be some evidence of negligence, and to try to impute the alleged negligence of one railroad to another in the absence

of some contract of agency would be stretching the interpretation of the Act to an absurd result. This is what the petitioner would have this Court do—hold the B&O Railroad Company responsible for the alleged negligence of the P&LE Railroad Company when it had absolutely no opportunity to inspect the car excepting what was disclosed to Mr. Shenker himself at the time he decided to go ahead and load even though the door would not open more than 24 inches.

A brief reference will not be made to the federal case cited by the petitioner with which he claims the decision of the court below is in conflict.

Ellis v. Union Pacific Railway Company, 329 U.S. 649, 91 L. Ed. 572. In this case, it was found that the nearness of the track to the building created an unsafe place to work and that:

> "Though the Engineer was an experienced railroad worker thoroughly familiar with this particular spur and though it was his duty to watch petitioner continuously or stop the engine, he failed either to warn petitioner or to stop the train in time to avert the tragedy." (page 651).

In the *Ellis* case, we have the act of negligence of a fellow employee causing the injury, not the mere presence of the petitioner on the property of a third person. This case affirms the proposition that the Federal Employers' Liability Act does not make the employer the insurer of the safety of his employees while on duty but that the basis of his liability is negligence which must be in whole or in part the cause of the injury.

Harris v. Pennsylvania Railroad Company, 361 U.S. 15, 4 L. Ed. 2d 1. The Court of Appeals of Ohio had been reversed by the Ohio Supreme Court, which in turn was reversed by this Court in the case above referred to. To ascertain the facts upon which the finding of negligence was based, we make several pertinent references to the Opinion of the Court of Appeals of Ohio. Henry J. Harris, plaintiff, was a member of the "wreck train crew" of the Pennsylvania Railroad Company. He was called in the night to join his "wreck train crew" in up-righting two overturned boxcars on the property of the Nickel-Plate Railroad Company. Rain and sleet were falling, and according to Harris's testimony there was mud, grease, and oil on the railroad ties. In the course of his work, plaintiff asked help to extract a block under one of the outriggers which supported the derrick car used in raising boxcars. The block was one foot wide, one-half foot thick, four feet long, and weighed about one hundred pounds. It had sunk into the mud four or five inches. The Court found that the plaintiff's foreman saw that it was difficult for one man to cope with this situation, but that nevertheless he said to the plaintiff, "You are a big strong man—we are busy. Hurry up." In order to attempt to raise the block, plaintiff had to stand on the cross tie. As the block jumped out of the mud and he was about to place it on his shoulder, his foot slipped and caused him to injure his back. The next day the section foreman saw grease "where we keep the switches lubricated."

The Ohio Court of Appeals made the statement, "It is common knowledge that the foot on the lower level under these circumstances would carry the greater weight, and that the foot on the tie, by reason of the resulting imbal-

ance, would be likely to slip on the mud and grease or oil." The tie in question was raised five inches above the ground. The Court found that the defendant, Pennsylvania Railroad Company, was negligent in requiring him to proceed alone in lifting the block under these circumstances. It said, "Yet the foreman who saw, or in the exercise of reasonable care should have seen this hazardous situation, permitted him to continue without help or warning him as to the danger facing him." And further, the Ohio Court said, "Defendant should have anticipated the plaintiff injuring himself when he was required to stand with one foot on the tie raised five inches above the ground and covered with mud and grease or oil, and the other foot on the ground tugging at the heavy timber imbedded in the ground. Defendant's foreman should have either ordered assistance for him or provided that the mud and grease or oil be removed or its sliminess reduced in some way."

From the foregoing excerpts it is quite apparent that the negligence with which the Pennsylvania Railroad Company was charged was the negligence of the crew foreman who was its own employee. Whether this accident had occurred on the property of the Pennsylvania Railroad Company, or of any other railroad or corporation, the result should have been the same. For the negligence of its own foreman, the Pennsylvania Railroad Company would be liable. The facts of the *Harris* case are entirely different from those in the *Shenker* case, and a careful reading of both will show that the *Harris* case does not apply to the *Shenker* case. In the case at bar there is no negligence of any superior of Michael Shenker. He was working alone at the time of the alleged injury.

Atlantic Coast Line R. Co. v. Robertson, 214 F. 2d 746 (C.C.A. 4). In this case, judgment was entered against both a pipe line company and a railroad. One of the distinctions between the *Robertson* case and the case at bar is that the railroad maintained the cars and the track on the pipe line company's premises and naturally would have some control over them. At page 751, the Court says:

> "The conditions prevailing in the yard at the time of the accident were not sporadic or unusual, but customary and continuous; and hence there was substantial basis for the finding that the Railroad Company failed to exercise ordinary care to provide for the safety of its employee when it directed him to perform the duties of car inspector in the area."

Chesapeake & Ohio Railway Company v. Thomas, 198 F. 2d 783 (C.C.A. 4): At page 786, we find that it is admitted that Hudson who was acting as fireman at the time of the accident had seen the standpipe fouling the track sixty days prior to the accident, at which time he was moving a single box car with Thomas, the decedent riding the leading end. Another witness testified that he had seen the standpipe fouling the track four, five or possibly six times.

It is obvious that in the *Thomas* case like the *Robertson* case that these conditions were "customary and continuous" and that they were known to the employees of the railway company, both at the time of the accident and prior thereto. These facts clearly distinguish these cases from the case at bar.

Kooker v. Pittsburgh & Lake Erie, 258 F. 2d 876 (C.C.A. 6): In this case, the plaintiff's car was parked in a parking lot provided by the railroad company. In order

to get to work, he had to go over a path on the property of a third person. The Court decided that whether defendant exercised dominion over the path on where the accident occurred should have been submitted to the jury. In the case at bar, the B&O Railroad Company exercised no dominion over the railroad tracks, train or cars of the P&LE Railroad Company either at the time of the accident or prior thereto.

Beattie v. Elgin, J. & E. R. Company, 217 F. 2d 863 (C.C.A. 7): In this case, the Court found at page 866 that "the evidence would justify the jury in finding this unsafe condition had existed frequently and recurringly for such a long time that defendant had constructive notice thereof." The Opinion then refers to *Grand Trunk Western Railroad v. Boulen*, 81 F. 2d 91-94, to the effect that "If such dangerous condition had been there sufficiently long so that defendant, in the exercise of ordinary care, ought to have known of its presence, a finding is well justified that it did not provide a reasonable safe place for working." It will be observed that the element of "time" enters into constructive notice. In the case at bar, there is no time element for the simple reason, as above indicated, that this train came into the station after Mr. Shenker had spotted his truck by the track and the only B&O employee who had any knowledge of the condition of the car was Shenker himself.

Terminal R. Association of St. Louis v. Fitzjohn, 165 F. 2d 473 (C.C.A. 8): In this case, there was a contract between the railroad and the Government relative to the moving of cars into the Ordnance plant. The side of the ramp next to the track on which the cars were standing consisted of a concrete wall. In this wall had been placed

several iron pipes or standards on the top of which electric lights were mounted. These standards were only about six inches from the side of a box car standing on or moving along the adjacent track. It was conceded by all that the clearance between the side of a box car on this track and these standards was wholly inadequate to permit a person riding on the side ladder of the box car to pass the standards without being knocked off or crushed between the side of the car and one of the standards. Plaintiff riding a car was severely injured. In that case, it was a permanent, "customary and continuous" condition which was conceded by all to be a dangerous condition. The railroad employees moving cars into the plant most certainly knew of this condition and their knowledge should be held to be the knowledge of the railroad company. There is a vast difference between a permanent and dangerous condition and the temporary presence of an alleged defective car in the railroad station in the case at bar.

Denver & R.G.W.R. Company v. Conley, 293 F. 2d 612 (C.C.A. 10): In this case, the plaintiff was thrown to the ground due to a faulty section of track. There was proof that the rail had become dangerously deteriorated after more than 30 years, and it was held that the railroad had a duty to *inspect tracks upon which it moves its trains*. The distinction is obvious between this case and the case at bar, where the tracks, train and cars were P&LE property.

Chicago G.W. Ry. Co. v. Casura, 234 F. 2d 441 (C.C.A. 8): In this case, judgments against the railroad and a meat packer were sustained when a switchman employed by the railroad was injured. A car moving on a spur track on the meat packer's premises came in contact with

a wooden gate and caused the gate to strike the railroad foreman who was walking along the track. The railroad company had been performing switching services for many years at the plant and in the adjacent stock yards of the meat packer. One of the items of negligence was that the railroad was pulling the cars along the track and through the gate at an unsafe and negligent rate of speed. As to the condition of the gates, the Court found at page 448:

> "In the instant case an inspection of these gateways would have disclosed that the iron bars which were utilized to hold the gates open simply rested on the flat surface of the cement and there were no holes in this surface into which the ends of the drop bars could be placed. It was also clear from an inspection that the gates were not otherwise held open and that they might readily have been held safely in an open position by hook and eye devices, or by providing holes in the cement to receive the ends of the bars. An inspection would also have shown that the bars were bent at the ends. No such inspection was made by the railway company and we think the jury, under the evidence, viewed in a light most favorable to the plaintiff, was warranted in believing not only that the place where plaintiff was required to work was not a safe place, but that the railway company failed to exercise ordinary care to discover the unsafeness of the place in which plaintiff was required to work and to use ordinary care to have it made into a reasonably safe place."

Here again we have a case where the condition was "not sporadic or unusual but customary and continuous." The railway company had the opportunity of inspecting

and failed to do so. In the case at bar, the B&O Railroad Company had no opportunity to inspect a condition which was, to say the least, unusual. The case at bar is more like that of *Wetherbee v. Elgin, Joliet & Eastern Railway Company*, 191 F. 2d 302 (C.C.A. 7), where the plaintiff was injured by a derailment caused by a board being left on the track. In that case, the Court found that the board was "a new threat" to safety, not something about which the railroad had previous knowledge.

Sinkler v. Missouri Pacific R. Co., 356 U.S. 326, 2 L. Ed. 2d 799: In the *Sinkler* case, the Houston Belt Railway Company was switching a car of the Missouri Pacific and caused the Missouri Pacific car to collide with another railroad car, injuring an employee of the Missouri Pacific. The Supreme Court pointed out that the Missouri Pacific owned one half of the stock, elected one half of the Directors of the Houston Belt Railway Company, and there was a contract by the terms of which a third person, here the Houston Belt Railway Company, performed switching operations for the employer. The jury answered a special Interrogatory and said that the Houston Belt Railway Company was under the control of the Missouri Pacific. Further, it was pointed out by the Supreme Court that switching is a vital operational activity of railroading and that at the time of the accident, the Houston Belt Railway Company was engaged in furthering the operational activities of the Missouri Pacific. Based upon these facts, it was held that the Houston Belt Railway Company was an agent of the Missouri Pacific and that the negligence of the Houston Belt was imputable to the employer. In the case at bar, The P&LE was not performing any operational activities for the B&O. Further, there was no contract between the two railroads. The Trial Judge specifi-

cally ruled out evidence of any contract and there is nothing to show any relation between the railroads. The *Sinkler* decision is just not applicable to the instant case.

Butz v. Union Pacific R. Co., 120 Utah 185, 233 P. 2d 332, upholds the position taken by Respondent, at page 344: "An employer is charged with responsibility for conditions of danger upon property of others of which employer has actual knowledge or is charged with constructive knowledge *because the hazard is of such nature and has existed for sufficient time that in exercise of reasonable care employer should have discovered it.*" This *Butz* case, as well as several of those above referred to, all require that before there can be constructive knowledge of a defective condition, the condition must have exceeded for a defective condition, the condition must have existed for a sufficient time that the employer should have discovered it. As we have said several times in this Brief, the B&O Railroad Company, employer of Michael Shenker, had no time whatever to discover the allged defect in the baggage car.

The law as stated by the Court of Appeals for the Third Circuit does not deprive any employee of the protection afforded him by the Federal Employers' Liability Act. It is just as necessary to protect the Railroads from judgments for which they are not legally liable as it is to protect the employee. To make the railroad liable simply because it sends a man to the premises of a third person to work, would make it an insurer of his safety and this Court has repeatedly said that such is not the intent of the Act. In fact, even if he is injured on premises of the employer, it is entitled to the benefit of the law which requires at least some slight evidence of negligence on it's

part before it can be held guilty of a violation of a duty it owed the employee.

In his Petition, the plaintiff's counsel makes this statement relative to recovery by persons sent to work on the line of another carrier. "They cannot recover from the other carrier, for they are not its employees." We respectfully submit that this is not a correct assumption. They can recover from the third party on whose premises they were injured if they prove negligence on the part of that third party, that is they have their right of action at common law. In the case at bar, this plaintiff joined the third party, namely, The Pittsburgh & Lake Erie Railroad Company as a defendant. Had it not been for the fact that there was no diversity between the P&L.E Railroad Company and the plaintiff, he would have had his recovery against that Railroad provided he proved negligence. He did not see fit to bring a cautionary suit in the State Court which would have preserved his right to proceed against The P&L.E Railroad Company. Therefore, he cannot complain now that he has no right of recovery against the said third party.

The question of law is of grave importance to the defendant, Respondent herein, and the Court of Appeals has correctly decided it. To hold otherwise would make the railroad an insurer and this is not the intent of the Act of Congress. We respectfully contend that the writ of certiorari should be denied.

Respectfully submitted,

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